

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 31 OF 1997
In the Matter of an Intended Appeal

BETWEEN

ANNA SEMAMBA MAKINDA APPLICANT

AND

DR. NDEMBVELA HERMAN NGUNANG'WA.. RESPONDENT

(Application to strike out Notice of
Appeal from the Judgment/Decree of
the High Court of Tanzania at Njombe)

(Kyando, J.)

dated the 20th day of January 1997

in

Misc. Civil Cause No. 1 of 1995

R U L I N G

KISANGA, J.A.:

This is an application to strike out the notice of appeal on grounds of failure to institute the appeal within the prescribed time. The application is supported by the affidavit of the applicant, Ms Anna Semamba Makinda and the joint affidavit of her two advocates Mr. D.C. Mbezi and Mr. J. Mushokorwa.

The gist of the applicant's case is that following the delivery of the judgement being appealed against, the respondent filed a notice of appeal on 23.1.97. In terms of rule 83 (1) of the Court of Appeal Rules the respondent had to institute the appeal within 60 days of the notice of appeal, but he had failed to do so.

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In other words the dead line for instituting the appeal was 23.3.97, but until the date of filing this application on 5.6.97 the appeal had not been instituted. The application further alleges that the respondent could not, in terms of the said rule 83 (1) of the Rules, rely on the exception to the 60 days limitation period because he did not send to the applicant a copy of his letter to the Registrar applying for a copy of proceedings in the case, if such a letter was written at all.

In answer to that, two counter-affidavits were filed, one by the respondent's advocate, Mr. E.O. Mbogoro, and another by Ms Mwanaidi Kinunda employed as Private Secretary by the firm of advocates of which Mr. Mbogoro is the senior partner. The sum total of both counter-affidavits is that a copy of the letter to the Registrar dated 31.1.97 applying for a copy of the proceedings in the case was duly sent to the applicant on 14.2.97. In support of the counter-affidavits, a dispatch book was produced showing that on 14.2.97 a letter was sent to Anna Semamba Makinda and was received by one Nyange.

It is further claimed that upon the Registrar notifying the respondent's advocate on 22.7.97, that the proceedings were ready for collection, the respondent's advocate acted immediately by collecting the same and paying for them. Thus, according to the respondent's counsel, the 60 days limitation period began to run against

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the respondent on 22.7.97 and, therefore, this application which was filed on 5.6.97 was brought prematurely because on that date the limitation period had not yet started to run, let alone running out!

The applicant's side further filed a total of six affidavits in answer to the two counter-affidavits seeking to show that a copy of the said letter to the Registrar was not sent to or received by the applicant or by anyone on her behalf!

It is apparent that the case turns largely on the affidavit of Mwanaidi Kinunda who said that she sent the letter in question to the office of the applicant! In her affidavit Mwanaidi does not name the person who she claims received the letter; and indeed Mr. Mdamu, learned advocate appearing for the respondent in this application, confirmed that Mwanaidi did not know the person who received that letter.

It is common ground, however, that the applicant herself could not have received the letter because she was not in Songea town on the material day; she was away in Njombe. According to the dispatch book, the person alleged to have received and signed for the letter is identified by only one name, that is, Nyange. The employee who handled the in-coming mail at the applicant's office at the material time were three only, namely,

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Francis Aidan Njozi, David Joseph Kiduo and Allanus Edward Nkosi. None of them went by the name of Nyange. These employees disowned the signature in the dispatch book against which the letter in question was allegedly received, adding that they could not identify the signature as being that of anyone working at the applicant's office.

There is an employee called Nyange Mbunda working as personal secretary assigned to the Regional Administrative Officer's office, and the only Nyange working in the Regional Block at Songea. She worked temporarily as personal secretary in the applicant's office between 13th and 24th January 1997 when Francis Aidan Njozi, the holder of that office was away attending a seminar in Dodoma. She ceased working at the applicant's office when Njozi returned from the seminar, and she resumed her duties at the Regional Administrative Officer's office on 27.1.97. Therefore, she could not have received the said letter on 14.2.97 because on that date she was no longer working at the applicant's office. She disowned the signature in the dispatch book against which the letter in question was allegedly received.

The basic rule in civil cases is that he who makes an allegation bears the burden of proving it. The question now is, has the respondent in the instant case discharged that burden by showing that the letter in question was

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duly sent to the applicant? It seems plain that the affidavit of Mwanaidi Kinunda which is the corner stone of the respondent's case, falls short of achieving that object. For, Mwanaidi did not identify Nyange, the person who she claims received the said letter. Nyange Mbunda, the only Nyange employed in the Regional Block at Songea, denied receiving the letter, disowned the signature in the dispatch book and denied being posted at the applicant's office on 14.2.97 when this letter was allegedly received there, her temporary assignment to that office during Njozi's absence having ended long before 14.2.97. And this latter is supported by Mr. Njozi who said that on 14.2.97 he was on duty at the applicant's office.

Mr. Mdamu submitted that for the applicant it must be proved through handing over notes that Nyange Mbunda had handed over the office to Mr. Njozi and that she was no longer working at the applicant's office on 14.2.97. First of all, it was not established that a change of office between personal secretaries involves any handing over notes. For, it cannot be assumed that the requirement of handing over notes when changing office applies to all cadres of employees. And secondly, even if it applies, it is not shown that relieving another employee temporarily for a short period of 14 days only, as was in this case, would call for a formal handing over involving handing over notes.

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But what is even more pertinent is that: The respondent was clearly aware of Nyange Mbunda's affidavit in which she completely disowned the signature in the dispatch book. The respondent did nothing about it. The inference is that the respondent conceded to Nyange Mbunda's disclaimer of the signature. Otherwise the respondent would have sought to prove that the signature is in fact hers. Indeed Nyange Mbunda's signature in her affidavit in this proceeding is materially different from that in the dispatch book against which the letter in question was allegedly received. This made it all the more necessary for the respondent to resort to other methods of proof, such as hand writing expert, to show that the two signatures were of one and the same person. As it is now, however, there is not the slightest proof that the signature appearing in the dispatch book is that of Nyange Mbunda. Consequently the respondent has not discharged the burden of proving that the letter in question was duly sent to the applicant.

This view is reinforced by the way in which the respondent handled the said letter. That letter is addressed to the Registrar and, rightly, copied to J. Mushokorwa, Advocate, who had acted for the applicant in the High Court. Now, the question is: Why was that copy not sent to Mushokorwa to whom it was copied but instead it was allegedly sent to the applicant?

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Mr. Mdamu's explanation for this during his submissions before me was that their Chambers were uncertain whether the letter would reach its destination, because previously they had sent a copy of the notice of appeal, in this very case, to the same addressee but no acknowledgement was was received. I am not at all impressed by this explanation. For, if it was decided to send the letter direct to the applicant, then one would expect that the letter would be copied to the applicant accordingly, but instead it was copied to Mwashokorwa and allegedly sent to another person. That was odd, and the inference to be drawn is that the letter was not sent to the applicant because it was not addressed or copied to her.

From all the material before me, I am satisfied that the copy of the respondent's letter to the Registrar applying for a copy of the proceedings was not sent to the applicant as alleged. The respondent, therefore, cannot avail himself of the exception under rule 83 (1) of the Court of Appeal Rules. Thus the appeal which ought to have been instituted within 60 days of his filing the notice of appeal on 23.1.97 cannot be saved. In the result the application succeeds. Accordingly the notice of appeal is struck out as prayed, with costs.

DATED at DAR ES SALAAM this 2nd day of September, 1997.

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(M. S. SHANGALI)
DEPUTY REGISTRAR